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Twenty-fifth session

SUMMARY RECORD OF THE 470th MEETING

Held at Headquarters, New York,
on Tuesday, 5 May 1992, at 3 p.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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International payments: draft Model Law on International Credit Transfers (continued)

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The meeting was called to order at 3.10 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

Article 16 (continued)

1. Mr. GREGORY (United Kingdom) said that his delegation felt it would be useful for the Commission to continue its consideration of paragraph (8) of article 16, on the basis of the proposal made by the representative of the United States of America to add the word "actual" before the words "intent" and "knowledge" and to change the words "might result" to "would be likely to occur". The word "recklessly" would remain unchanged.

2. Mr. SCHNEIDER (Germany) said he was not sure that that proposal really helped to define the term "knowledge". It was not necessary to work out a detailed definition of that concept as long as the Commission considered that the term "recklessly" implied intent. However, the concept of knowledge could give rise to problems in a large bureaucracy or in groups of companies if, for example, the knowledge of one person in a corporation was assumed to be the knowledge of the whole corporation or the director of a holding company was supposed to know what was going on in the company's subsidiaries. The concept of knowledge should be mentioned in connection with the payment order by stipulating that a bank must be informed of any special risk; if it received specific information to that effect from the originator or sender, the bank could decide whether or not to accept a payment order. The phrase "actual knowledge" was far too broad.

3. Mr. CRAWFORD (Canada) said that the German proposal did not seem to solve the problem that the representative of Germany had raised. A reference to specific information provided by the sender would not solve the real problem of trying to determine what a corporation really knew. It would be unwise to rule out from the text doctrines that might exist in various systems of national law or to impute knowledge where it was generally accepted that it did not exist. The Commission would have to decide whether information given to a clerk by the sender of a payment order constituted knowledge of the corporation and whether everything that was said at the point of contract was part of the contract. The Commission should try to identify a responsible act that would credibly bind the bank or corporation to extraordinary terms. The matter should be referred to the Drafting Group.

4. Mr. EL-SHARKAWY (Egypt) agreed that the words "actual intent" should not be used, since actual intent or knowledge could not be proved in the case of legal entities like banks or corporations. Paragraph (8) should be retained as it stood.

5. Mr. GREGORY (United Kingdom) said that the rule in question applied only where a country wished to make additional remedies available. The Commission

(Mr. Gregory, United Kingdom)

should not stray too far into the area of corporate knowledge. It had been concerned about excluding constructive knowledge, and by agreeing to use the words "actual knowledge" it had addressed that concern. It was inappropriate to try to define actual knowledge further, given the complexity of corporate structures in the banking world. Nor was it appropriate to take into account information received from the sender, since information could be received from a variety of sources. If the information was known to the bank, it ought to bring the bank within the scope of the rule.

6. Mr. CHATURVEDI (India) said that his delegation did not support the proposal to add the word "actual" because it sought to make the scope of judicial review, remedy and intervention more exclusive. That course was inappropriate and did not accord with India's judicial system.

7. Mr. VASSEUR (Banking Federation of the European Community) recalled that there had been a case involving Manufacturers Hanover Trust when the United States courts had determined that the bank could not be held responsible for a transfer made by one office without the knowledge of the office responsible for transfers. He felt that paragraph (8) should be retained as it stood.

8. The CHAIRMAN said that the proposed amendment seemed to be acceptable to the Commission. It accorded with the objective of making a bank responsible if it failed to fulfil its obligations.

9. The concern expressed by the representative of Germany related to a different problem which should be considered by the Commission. It pertained not to liability as such, but to another requirement for the existence of liability, which would make the sender responsible for sending information.

10. Mr. FELSENFELD (United States of America) said that the problem raised by the representatives of Germany and Canada was not easily solved. One solution that had been found successful was to have the bank acknowledge in writing that it knew of the risk involved.

11. Mr. CHATURVEDI (India) said he agreed with the representative of the United States and therefore opposed the addition proposed by the representative of Germany since it would further curtail the scope of remedies a customer or sender could secure from a bank for its fault.

12. Mr. CRAWFORD (Canada) suggested that the German proposal might be incorporated elsewhere in the draft Model Law. It was really a specific application of the freedom envisaged in article 3 for the rights and obligations of parties to a credit transfer to be varied by their agreement. By giving a written acknowledgement of specific risk that it was undertaking, a bank would be operating outside the scope of the Model Law. The idea of a special contract to accomplish a specific result within a specific time was useful, but went too far. The Commission's objective was to isolate reprehensible conduct by a bank.

13. Mr. LOJENDIO (Spain) said that the problem could be resolved under paragraph (7), which made provision for a bank to assume greater liability.

14. Mr. DE BOER (Observer for the Netherlands) said that if the remedies were exclusive, as stated in paragraph (8), the exclusivity related to the specific subject, and if there was no remedy for a given subject there was no exclusivity.

15. Mr. CHATURVEDI (India) concurred with the Observer for the Netherlands. The exclusivity referred to in paragraph (8) applied only to the situation described in the Model Law.

16. Mr. LIM (Singapore) agreed that paragraph (8) as drafted might imply the existence of other remedies; however, if the word "remedy" was interpreted to mean "liability", that could mean that no liability could be maintained other than that covered by the Model Law.

17. Mr. AZZIMANE (Morocco) said that misinterpretation of paragraph (8) could be avoided if the phrase "the remedies provided in this law" was replaced by "the liability remedies provided in this article". Paragraph (8) would thus be better integrated with the whole of article 16 and there would be no risk of confusing the remedies specified in that article with other actions not related to liability.

18. Mr. PELICHET (Observer for The Hague Conference on Private International Law) endorsed the suggestion made by the representative of Morocco, which would avoid any confusion between the remedies mentioned in paragraph (8) and the "rights ... as may otherwise be provided by law" mentioned in articles 11(7) and 15.

19. Mr. EL-SHARKAWY (Egypt) said that if remedies other than the payment of interest existed, paragraph (8) should constitute a separate article. He agreed that the paragraph should refer to remedies "in this article" rather than "in this law".

20. Mr. BERGSTEN (Consultant to the Secretariat) drew attention to paragraph 40 of the comments on article 16 in document A/CN.9/346, referring to additional remedies that could be added to the text of the article or to the application of remedies generally available in the legal system.

21. Article 4(6) dealt with the obligations of sending banks. In executing a payment order, a receiving bank was of course obliged to send its own payment order and thus became a sending bank. The question before the Commission was whether it should not in that capacity be obliged to pay interest to its own receiving bank if its payment order was accepted and it did not then make it good promptly. There appeared to be no such obligation in the Model Law, nor was it entirely clear that the exclusivity statement in paragraph (8) precluded the payment of such interest, which members would no doubt agree should be payable.

(Mr. Bergsten)

22. With respect to the "duty to assist" mentioned in article 12, he referred to members to paragraph 5 of the comments on that article (A/CN.9/346) and noted that the Commission had decided at its twenty-fourth session that there should be no penalties set out in the Model Law for failure to assist.

23. Mr. GREGORY (United Kingdom) said he understood that a receiving bank was not liable, as a receiving bank, for any delay caused by a failure to pay. Yet if paragraph (8) stipulated that remedies were exclusive, there would be no requirement to pay interest that was otherwise due. That was a problem that required attention and was not addressed in paragraph (1).

24. Mr. BURMAN (United States of America) said his delegation was still not convinced that a problem existed, but thought that the proposal put forward by the representative of Morocco might resolve the issue quickly.

25. Mr. CHATURVEDI (India), supported by the representative of France and the Observer for the Netherlands, said that his delegation could support the Moroccan proposal. There would then be no need to clarify article 4(6), since article 16 would be self-contained.

26. Mr. GREGORY (United Kingdom) was not sure the proposal achieved the desired result. The operative sentence of paragraph (8) was the second one, beginning "these remedies shall be exclusive ...", and the proposed change did nothing to alter it.

27. Mr. BURMAN (United States of America) said that in order to clarify paragraph (8) the Drafting Group might wish to add a reference to other legal remedies similar to the references in articles 11(7) and 9(1).

28. Mr. LIM (Singapore) thought that the problem raised by the representative of the United Kingdom could be solved by adding "in respect of liability under this article" after the word "remedies" in the second sentence of paragraph (8), although that did not deal with the problem posed by article 12.

29. Mr. CRAWFORD (Canada) said that as no remedy was provided in articles such as 4(6), article 16 had no bearing on them. Each jurisdiction had its own remedies. If remedies were not relevant to article 16, then the article needed no modification. Moreover, if the "obligation to repay" that was mentioned in several articles was self-executing, then there was no need to address it in article 16; if it was not, then there was a need to enforce remedies in article 16.

30. There was also some confusion over the terms "right", "obligation", "duty" and "remedy", which seemed to be used with overlapping meanings. The Drafting Group might also have difficulty in distinguishing those terms.

31. The CHAIRMAN said that the exclusivity of remedies under article 16 should not affect the obligations under article 4(6), and it would therefore be desirable to eliminate any ambiguities. As for the enforcement of remedies for failure to assist, it seemed that the Commission preferred to leave the matter to the applicable law in each State.

The meeting was suspended at 4.35 p.m. and resumed at 5 p.m.

32. The CHAIRMAN said that the Commission appeared to want the remedies provided for to be exclusive to situations covered by the provisions of article 16, with the Model Law not seeking to exclude any remedies for failure to comply with the provisions of article 4(6). He therefore suggested that the Drafting Group should consider paragraph (8), taking into account the proposal made by the representative of Morocco.

33. It was so decided.

34. The CHAIRMAN said that another question arising in connection with article 16(8) resulted from article 11(5) and (6), under which the Model Law provided for a refund to be passed on to the benefactor in cases where a delay had occurred in a transfer from the originator to the benefactor. There were two possible solutions: either the Commission could stipulate that a refund with interest should be made, or it could remain silent on the matter. However, the decision concerning the exclusive nature of article 16 could lead to ambiguity in the context of article 11(5) and (6).

35. Mr. GREGORY (United Kingdom) said that his understanding was that the Commission sought to relate article 16(8) only to situations covered by article 16. That meant that the Commission should remain silent as to any remedies which might be available for failure to comply with refund obligations under article 11(5) and (6). He therefore wondered whether the Chairman was now proposing to include an additional provision in article 11 stipulating that interest should be payable for failure to comply with refund requirements.

36. The CHAIRMAN said that he was not making any such suggestion. It was simply that there had been no discussion of provisions other than article 4(6) to which article 16(8) might relate.

37. Mr. CRAWFORD (Canada) said that the whole question of the intended scope of article 16 needed to be considered. It was by no means certain that in its present form the article would preclude a court from awarding general damages in addition to the specific amount of repayment due. Throughout its discussions on the Model Law, the Commission had always taken the view that interest should be the only penalty imposed on banks which were late in fulfilling their obligations. Article 16 did not fully accomplish that objective, in that it did not extend the exclusivity function of paragraph (8) to every obligation contained in the Model Law. Unless the scope of article 16 was extended, it would remain open to national courts to award damages in excess of the amount required for repayment plus interest.

38. Mr. CHATURVEDI (India) said that in his view there had been sufficient discussion of the matter. The Commission had decided that exclusivity should apply only to article 16 and therefore articles 4(6) and 11(5) were not affected. The matter should now be left to the Drafting Group.

39. The CHAIRMAN recalled that, during the discussion on paragraph (1), the representative of Japan had accepted the paragraph on the understanding that his proposal concerning the cost of the issuance of new payment orders would be considered when the Commission took up paragraph (8).

40. Mr. FUJISHITA (Japan) said that his delegation did not support the retention of paragraph (8). If the paragraph was to be retained, the provision on damages which could not be recovered under paragraph (1) should include not only interest, but also legal fees and the cost of reissuing the credit transfer. The United Kingdom representative had explained earlier that liability provisions had been omitted from the redraft of article 16 because the article provided for an objective type of liability, an argument for which he found little justification.

41. Mr. CHATURVEDI (India) said that he supported the Japanese proposal.

42. The CHAIRMAN said that, after reviewing the report of the Commission's previous session (A/46/17), he had concluded that the attribution of legal fees had been omitted because it was considered to be a matter which fell within the purview of national, rather than international, law. At the urging of one delegation, it had been agreed that a footnote should be inserted, drawing the attention of national legislators to the need to attribute legal fees and other costs to the party which had failed to comply with a legal obligation. The footnote, however, was missing from the text, and he wondered what the reason for that was.

43. Mr. FUJISHITA (Japan) said he understood the Chairman to mean that each country that was party to a dispute was free to award legal fees; accordingly, he withdrew his proposal.

Article 17

44. The CHAIRMAN said that article 17(1) defined the moment of completion of a credit transfer as the moment when the beneficiary's bank accepted the payment order, thus releasing the bank from any further obligations towards the beneficiary. That was an objective definition which was acceptable to all parties to the transfer.

45. Mr. VASSEUR (Banking Federation of the European Community) said that at a previous meeting, he had drawn attention to the issue of force majeure, which was not taken into account by the text as currently drafted. Prior article 13, however, to which the secretariat had referred in paragraph 47 of its comments on article 16 (A/CN.9/346), had envisaged exemptions from the liability of banks under certain circumstances, such as the interruption of

(Mr. Vasseur)

communication facilities or equipment failures, suspension of payments by another bank, emergency conditions, and so on. His organization wanted to see that article reinstated in the Model Law. As a general rule, agreements between banks, or between banks and clients, contained force majeure provisions.

46. The CHAIRMAN, after reading out the text of prior article 13, said that the Working Group had decided to delete that text on the grounds that, even if a delay resulted from force majeure, the bank would still be holding the funds, which would be generating interest, and the beneficiary should retain the interest.

47. Mr. AL-NASSER (Saudi Arabia) proposed that paragraph (1) should be amended as follows: "The credit transfer takes place when the beneficiary's bank accepts the payment order and the bank becomes indebted to the beneficiary for the amount of the payment order".

48. Mr. SCHNEIDER (Germany) said that he shared the views expressed by the representative of the Banking Federation of the European Community. Not only footnotes, but whole articles sometimes disappeared. Articles 13 and 16 had once been combined; in the process of separating them, the provision on interest rates had been lost.

49. The CHAIRMAN said that prior article 13 had not simply disappeared. According to the report of the Working Group on International Payments on the work of its twenty-second session (A/CN.9/344), the Working Group had decided to delete the article because, as liability existed only for interest, according to the Model Law, there was no need to maintain a rule on exemption.

50. Mr. LE GUEN (France) said that his delegation had difficulty with the first sentence of paragraph (1). The notion that a credit transfer was completed when the beneficiary's bank accepted the payment order was not in keeping either with French law or with article 2 of the Model Law (Definitions). Under article 2, a transfer was defined by its purpose, namely, to place funds at the disposal of the beneficiary; however, article 17(1) did not deal with the final stage of the transaction and was therefore in conflict, not only with article 2, but also with the title of the Model Law. Problems also arose with regard to article 18 (Conflict of laws) since, if the relationship between the beneficiary and the bank remained outside the scope of the Model Law, an entirely new set of rules could be introduced in the course of the transaction.

51. The CHAIRMAN said that the initial draft of article 2 had contained a bracketed sentence to the effect that a credit transfer was completed when the beneficiary's bank accepted the funds. It had been decided, however, that a rule on completion did not belong in an article on definitions, and the sentence had been moved to article 17. Consideration had been given to designating as the moment of completion the moment when the transferred funds

(The Chairman)

were credited to the beneficiary's account; however, banking practices varied widely in different countries. Furthermore, the question of when to place the funds at the disposal of the beneficiary was for the bank to decide, and it would be difficult for a third party to determine that moment objectively.

The meeting rose at 6 p.m.